

No. 13-369

IN THE
Supreme Court of the United States

NAUTILUS, INC.

Petitioner,

v.

BIOSIG INSTRUMENTS, INC.

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

**BRIEF OF NOKIA CORPORATION AND NOKIA
USA INC. AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

 I. CHANGING THE STANDARD FOR
 INDEFINITENESS IS NOT THE
 APPROPRIATE VEHICLE FOR
 ADDRESSING THE HARMS FOR
 WHICH PETITIONER COMPLAINS..... 4

 A. The Current Patent Laws Contain
 Adequate Avenues To Provide The
 Relief Petitioner Seeks 4

 1. Claim Breadth May Be Better
 Resolved Through Prior Art
 Challenges..... 6

 2. Overreaching On Claim Scope
 May Be Challenged As Lacking
 Written Description Support..... 7

 B. The Federal Circuit’s Application of
 § 112 Does Not Make It Impossible To
 Render Claims Indefinite..... 9

II. PETITIONER FAILS TO EXPLAIN THE ROLE OF CLAIM CONSTRUCTION UNDER ITS NEW STANDARD.....	11
A. Petitioner’s Approach Contradicts Claim Construction’s Fundamental Role In Resolving Reasonable Disputes Over Claim Meaning	11
B. Petitioner Offers Little Clarification When Claim Construction Would, Or Would Not, Be Appropriate Under Its Standard	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Autogiro Co. of America v. U.S.</i> , 384 F.2d 391 (Ct. Cl. 1967)	13
<i>Datamize, LLC v. Plumtree Software, Inc.</i> , 417 F.3d 1342 (Fed. Cir. 2005).....	5
<i>Duncan v. Walker</i> , 533 U.S. 167 (2001)	8
<i>Ergo Licensing, LLC v. CareFusion 303, Inc.</i> , 673 F.3d 1361 (Fed. Cir. 2012).....	10
<i>Exxon Chem. Patents, Inc. v. Lubrizol Corp.</i> , 64 F.3d 1553 (Fed. Cir. 1995).....	12
<i>Exxon Research and Eng'g Co. v. U.S.</i> , 265 F.3d 1371 (Fed. Cir. 2001).....	5, 10
<i>Gentry Gallery, Inc. v. Berkline Corp.</i> , 134 F.3d 1473 (Fed. Cir. 1998).....	7
<i>Graham v. John Deere Co. of Kansas City</i> , 383 U.S. 1 (1966)	15
<i>Halliburton Energy Services, Inc. v. M-I LLC</i> , 514 F.3d 1244 (Fed. Cir. 2008).....	10
<i>In re Hyatt</i> , 708 F.2d 712 (Fed. Cir. 1983).....	5

<i>Linear Tech. Corp. v. Int’l Trade Comm’n</i> , 566 F.3d 1049 (Fed. Cir. 2009).....	15
<i>Markman v. Westview Instruments, Inc.</i> , 517 U.S. 370 (1996)	passim
<i>Permutit Co. v. Graver Corp.</i> , 284 U.S. 52 (1931)	8
<i>Praxair, Inc. v. ATMI, Inc.</i> , 543 F.3d 1306 (Fed. Cir. 2008).....	9
<i>Purdue Pharm. L.P. v. Faulding, Inc.</i> , 230 F.3d 1320 (Fed. Cir. 2000).....	7
<i>TecSec, Inc. v. Int’l Bus. Mach. Corp.</i> , 731 F.3d 1336 (Fed. Cir. 2013).....	10, 13
<i>Tessera, Inc. v. Int’l Trade Comm’n</i> , 646 F.3d 1357 (Fed. Cir. 2011).....	15
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001)	8
<i>Ultimax Cement Mfg. v. CTS Cement Mfg.</i> , 587 F.3d 1339 (Fed. Cir. 2009).....	6
<i>United Carbon Co. v. Binney & Smith Co.</i> , 317 U.S. 228 (1942)	9
<i>Vas-Cath Inc. v. Mahurkar</i> , 935 F.2d 1555 (Fed. Cir. 1991).....	7

STATUTES AND REGULATIONS

35 U.S.C. § 102.....	3, 5
35 U.S.C. § 103.....	3
35 U.S.C. § 112.....	passim
Leahy-Smith America Invents Act, Pub. L. No. 112-29, §4(c), 125 Stat. 284 (2011).....	9
Manual of Patent Examining Procedure § 2173.04	5
Manual of Patent Examining Procedure § 2173.02(I)	6

OTHER AUTHORITIES

David L. Schwartz, <i>Pre-Markman Reversal Rates</i> , 43 Loy. L.A. L. Rev. 1073 (2010).....	13
Kristen Osenga, <i>Linguistics and Patent Claim Construction</i> , 38 Rutgers L. J. 61 (2006).....	12
Robert A. Faber, <i>Mechanics of Patent Claim Drafting</i> (6th ed. 2008).....	12
Woodward, <i>Definiteness and Particularity in Patent Claims</i> , 46 Mich. L.Rev. 755 (1948)	12

INTEREST OF THE *AMICI CURIAE*¹

Amici curiae are Nokia Corporation and Nokia USA Inc. (collectively, “Nokia”). Nokia is a global leader in the development and manufacture of handheld devices and mobile communications technologies. Nokia has invested over \$50 billion to date in research and development in support of these activities. As a result of these extensive efforts, Nokia has contributed to the development and success of a number of commercially viable mobile technologies and standards, evidenced by the thousands of globally granted patents awarded to Nokia. Through this substantial commitment to technological progress, Nokia has amassed a patent portfolio comprising over 10,000 patent families.

Nokia is involved in numerous U.S. patent lawsuits, both as a plaintiff and defendant. Nokia thus understands the importance of applying balanced legal principles that protect the innovations of those who have invested significant resources, while at the same time recognizing that there is an

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief, and no other person other than *amici curiae*, its members, or its counsel made such a contribution. Pursuant to Supreme Court Rule 37.3, counsel for *amici curiae* represent that all parties have consented to the filing of this brief. Both Petitioner and Respondent have filed with the Clerk blanket consents for the filing of *amicus curiae* briefs in support of either party.

interest in drafting claims that are understandable to a person having ordinary skill in the art.

Nokia's interest in this case is to advocate for patent laws that achieve the proper balance between the protection of a patentee's innovations and the public notice function regarding the scope of coverage sought by the patentee. Nokia, as a world leader in wireless innovation and as a target for patent infringement lawsuits, supports Respondent's position that the indefiniteness standard currently applied by the Federal Circuit reaches the proper balance and provides the requisite stability to incentivize further investments. Nokia takes no position on any other substantive issues in this matter.

SUMMARY OF ARGUMENT

Petitioner requests that this Court overturn decades of jurisprudence holding that a claim must be insolubly ambiguous before it can be rendered indefinite. In support of its position, Petitioner argues that the current standard applied by the Federal Circuit makes it too difficult for those accused of patent infringement to invalidate claims under § 112(b), and as a result, patentees are being issued broad claims and seeking protection that extends beyond their original disclosures.

These arguments are without support because Congress has already provided accused infringers with other mechanisms to address the precise harms

complained of. Specifically, §§ 102 and 103 address Petitioner's overbreadth issues, while § 112(a)'s written description requirement prevents patentees from overreaching beyond their original patent disclosure. For these reasons, the indefiniteness requirement of § 112(b) need not be re-interpreted.

Petitioner also fails to address adequately the role of claim construction under its broad re-interpretation of § 112. The difficulties of describing an applicant's invention with a collection of words inevitably will result in reasonable disputes as to the claim's meaning. Indeed, this Court's establishment of centuries-old claim construction jurisprudence acknowledges that such reasonable disputes will occur. Adopting Petitioner's standard could render indefinite every claim whose meaning could be reasonably disputed and effectively overturns hundreds of years of claim construction precedent of this Court. In addition, such an interpretation would lead to widespread uncertainty regarding every patent subject to a previous claim construction ruling, as well as millions of patents currently in force. For entities like *amici*, this will act as a disincentive for investments in the research and development of innovative devices and standards in the telecommunications industry.

ARGUMENT

I. CHANGING THE STANDARD FOR INDEFINITENESS IS NOT THE APPROPRIATE VEHICLE FOR ADDRESSING THE HARMS FOR WHICH PETITIONER COMPLAINS

Under this country's patent regime, the definiteness requirement plays an important role in assuring that claims are drafted in a comprehensible manner, but it is not one of the tools Congress has provided to remedy issues such as claim breadth or overreaching by patent holders. Those concerns are more appropriately addressed through separate provisions of Title 35, and re-interpreting § 112(b) in the manner Petitioner suggests is therefore both unnecessary and inconsistent with settled principles of statutory construction. Moreover, § 112(b), as currently applied, serves its intended purpose of removing claims which fail to have any meaning.

A. The Current Patent Laws Contain Adequate Avenues To Provide The Relief Petitioner Seeks

Broad, unsupported patent claims may be problematic for companies facing a threat of litigation, but mounting an indefiniteness challenge is not necessarily the only, or even proper, approach to defend against them. Instead, the existing patent laws already provide other appropriate avenues to address these types of claims. In particular, overly

broad claims are better resolved through validity challenges based on the prior art, while claims extending beyond the scope of the patent disclosure may be challenged on the grounds that they lack sufficient written description or enabling disclosure. *See, e.g., In re Hyatt*, 708 F.2d 712, 715 (Fed. Cir. 1983) (explaining differences between patentability of broad claims under 35 U.S.C. §§ 102 and 112; Manual of Patent Examining Procedure § 2173.04 (suggesting that broad claims may be appropriately rejected as lacking a sufficient written description or an enabling disclosure, or alternatively rejected based on prior art). Because Congress has already defined tools for addressing overbreadth, there is no need to modify the distinct indefiniteness standard to achieve the same ends. *See Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347 (Fed. Cir. 2005) (“The definiteness requirement, however, does not compel absolute clarity. Only claims ‘not amenable to construction’ or ‘insolubly ambiguous’ are indefinite.”) (internal citations omitted); *Exxon Research and Eng’g Co. v. U.S.*, 265 F.3d 1371, 1375 (Fed. Cir. 2001) (“We engage in claim construction every day, and cases frequently present close questions of claim construction on which expert witnesses, trial courts, and even the judges of this court may disagree.”).

1. Claim Breadth May Be Better Resolved Through Prior Art Challenges

Petitioner's first suggestion that a patent claim's broad scope is synonymous with indefiniteness lacks merit. Breadth is not to be confused with indefiniteness. *Ultimax Cement Mfg. v. CTS Cement Mfg.*, 587 F.3d 1339, 1352 (Fed. Cir. 2009) ("Merely claiming broadly does not render a claim insolubly ambiguous, nor does it prevent the public from understanding the scope of the patent."); *see also* Manual of Patent Examining Procedure § 2173.02(I) ("Examiners, however, are cautioned against confusing claim breadth with claim indefiniteness. A broad claim is not indefinite merely because it encompasses a wide scope of subject matter provided the scope is clearly defined."); *id.* at § 2173.04 ("Breadth is not indefiniteness.").

For example, a claim reciting a broad range of values (*e.g.*, a range for a percentage of a composition by volume) should not be rendered indefinite simply because the precise value is not specified. In such a scenario, a more appropriate approach, and one provided by the patent laws, would be for an alleged infringer to come forward with prior art that either anticipates or renders obvious the broad range as claimed. The same avenue is available even where the claims recite no range of values, but the patentee nevertheless seeks broad patent coverage encompassing the prior art.

2. Overreaching On Claim Scope May Be Challenged As Lacking Written Description Support

Petitioner next asserts that any purported ambiguity in claim language has led to patentees overreaching for protection beyond what is suggested by the patent specification. The definiteness requirement of § 112(b), however, is not aimed at tackling issues of overreaching. Instead, the written description requirement codified at § 112(a) specifically addresses this concern, irrespective of whether the claim contains an ambiguity. *Gentry Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473, 1479 (Fed. Cir. 1998) (to fulfill the written description requirement, “the patent specification ‘must clearly allow persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed.’”) (citations omitted).

Where a patentee is unable to show that he or she had possession of the claimed invention at the time of the application’s filing, the proper result, therefore, is not to render the claim indefinite, but instead find that the claim is invalid for lack of written description. *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1561 (Fed. Cir. 1991) (an “[a]dequate description of the invention guards against the inventor’s overreaching by insisting that he recount his invention in such detail that his future claims can be determined to be encompassed within his original creation”) (internal quotations omitted); *Purdue Pharm. L.P. v. Faulding, Inc.*, 230 F.3d 1320,

1326-27 (Fed. Cir. 2000) (“[O]ne cannot disclose a forest in the original application, and then later pick a tree out of the forest and say here is my invention.”).

If the Court were to nevertheless agree with Petitioner and adopt a new interpretation of the § 112(b) definiteness requirement specifically targeting a patentees’ overreaching, this would render the distinct written description requirement of § 112(a) redundant, counter to well-settled principles of statutory construction. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *see also Permutit Co. v. Graver Corp.*, 284 U.S. 52, 57-58 (1931) (finding that patent lacks sufficient written description where it failed to describe a claimed embodiment, and separately finding claim invalid for failure to “particularly to point out and distinctly claim . . . ‘the part, improvement, or combination which he claims as his invention.’”).

The definiteness requirement of § 112 has the distinct purpose of preventing incomprehensible claims. It was not meant to replace, gut, or blur the other portions of Title 35 that address related, but separate, issues. Petitioner’s new interpretation therefore cannot be correct.

Moreover, even when § 112 was recently amended by the America Invents Act, Congress kept the separate written description and definiteness requirements largely intact,² strongly suggesting that it intended that these two doctrines serve distinct purposes under the patent laws. *Compare* 35 U.S.C. § 112 (2011) *with* 35 U.S.C. § 112 (2014). Congress was also well aware of the current Federal Circuit standard when it retained the existing language regarding definiteness, suggesting that it did not intend to alter this standard.

B. The Federal Circuit’s Application of § 112 Does Not Make It Impossible To Render Claims Indefinite

Much of Petitioner’s argument rests on the incorrect assumption that proving indefiniteness under existing precedent is an insurmountable task. Not so. This Court and the Federal Circuit properly acknowledge that the role of § 112(b) is not a catch-all invalidity defense; rather, § 112(b)’s reach is limited to situations where a claim is nonsensical or incomprehensible. *See, e.g., United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 237 (1942) (recognizing that indefiniteness is a defense distinct from other types of invalidity); *Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1319 (Fed. Cir. 2008) (“A claim will be found indefinite only if it “is insolubly

² The America Invents Act amended § 112(a) and (b) to add paragraph letters and a reference to joint inventors. Leahy-Smith America Invents Act, Pub. L. No. 112-29, §4(c), 125 Stat. 284 (2011).

ambiguous, and no narrowing construction can properly be adopted”) (citing *Exxon Research and Eng’g Co.*, 265 F.3d at 1375).

Interpreting the definiteness requirement any differently opens the door for an alleged infringer to seek invalidity of a patent claim simply by raising a reasonable alternative interpretation of the claim. Indeed, most skilled patent litigators would be able to accomplish this task with relatively little effort. Instead, the correct approach, and the one advanced by this Court and the Federal Circuit, is to engage first in construction of the claim to ascertain its meaning. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 371 (1996) (“As the former patent practitioner, Justice Curtis, explained, *the first issue* in a patent case, construing the patent, is a question of law, to be determined by the court.”) (emphasis added); *TecSec, Inc. v. Int’l Bus. Mach. Corp.*, 731 F.3d 1336, 1351 (Fed. Cir. 2013) (stating that the first step in an infringement analysis is the construction of the patent claim).

In the event one of ordinary skill is unable to ascribe any meaning to a claim, that claim fails to meet the statutory requirements of § 112(b). The Federal Circuit has consistently applied this rule, and indeed continues to apply this standard in rendering claims indefinite. *See, e.g., Ergo Licensing, LLC v. CareFusion 303, Inc.*, 673 F.3d 1361 (Fed. Cir. 2012); *Halliburton Energy Services, Inc. v. M-I LLC*, 514 F.3d 1244 (Fed. Cir. 2008).

II. PETITIONER FAILS TO EXPLAIN THE ROLE OF CLAIM CONSTRUCTION UNDER ITS NEW STANDARD

Petitioner's newly created standard for indefiniteness would potentially render indefinite every single claim whose meaning was in dispute, effectively destroying the well-settled role of claim construction in patent disputes. Such a position is contrary to the rulings of this Court, and cannot be correct. Additionally, for *amici*, this new interpretation may add uncertainty to its extensive patent portfolio, resulting in a disincentive to invest further resources in the industry of which it is an active participant.

A. Petitioner's Approach Contradicts Claim Construction's Fundamental Role In Resolving Reasonable Disputes Over Claim Meaning

The claim construction process exists because the meanings of patent terms are regularly subject to reasonable dispute. Indeed, the mere fact that this Court has stressed the importance of claim construction for centuries is a strong indication that reasonable disputes as to the meaning of claim terms are inevitable. *See Markman*, 517 U.S. at 390 (discussing importance of claim construction); *see also id.* 377-383 (providing history of claim construction dating back to 1850).

The necessity of claim construction stems from the innate difficulty in describing an applicant's invention, often comprising complex technologies, in terms on which every skilled artisan in the field can agree. See *Markman*, 517 U.S. at 388 (“Patent construction in particular ‘is a special occupation, requiring, like all others, special training and practice.’”). The difficulty in drafting claims is no secret to the patent community. See generally, e.g., Robert A. Faber, *Mechanics of Patent Claim Drafting* (6th ed. 2008). This Court and the Federal Circuit both recognize that claim drafting is an art, and as a result, properly hold that penalizing the patentee for claim drafting that is “less than ideal” is inappropriate. *Markman*, 517 U.S. at 388; see also *id.* (“Claims of patents have become highly technical in many respects as the result of special doctrines relating to the proper form and scope of claims that have been developed by the courts and the Patent Office”) (quoting Woodward, *Definiteness and Particularity in Patent Claims*, 46 Mich. L.Rev. 755, 765 (1948)); *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1563 (Fed. Cir. 1995) (Plager, J. concurring) (“Claim drafting is itself an art, an art on which the entire patent system today depends.”).

Because of difficulties such as these, claim construction becomes a necessary task, especially since any two patent drafters are unlikely to independently describe the same invention using precisely the identical choice and arrangement of words. See, e.g., Kristen Osenga, *Linguistics and Patent Claim Construction*, 38 Rutgers L. J. 61, 66-

67 (2006) (explaining difficulty in drafting patent claims); *see also Autogiro Co. of America v. U.S.*, 384 F.2d 391, 396-97 (Ct. Cl. 1967) (“The inability of words to achieve precision is none the less extant with patent claims. . . . This conversion of machine to words allows for unintended idea gaps which cannot be satisfactorily filled. Often the invention is novel and words do not exist to describe it.”). As a result, nearly every patent dispute requires at least some term to be interpreted by a court. *See, e.g., Markman*, 517 U.S. at 371 (explaining that the “the first issue in a patent case” is construing the patent); *TecSec, Inc.*, 731 F.3d at 1351 (determination of infringement first requires court to construe the claims).

The new interpretation of § 112(b) Petitioner asks the Court to adopt effectively guts this entire centuries-old doctrine, as every claim that contained a term whose meaning was in dispute—and would otherwise be subject to claim construction under existing precedent—would by definition be indefinite. Even a common scenario where a dispute exists whether the specification or prosecution history contains a disavowal of claim scope would result in the claim term being ambiguous beyond repair.

Moreover, in recent years, the claim construction reversal rate at the Federal Circuit has been as high as 37.5%. *See* David L. Schwartz, *Pre-Markman Reversal Rates*, 43 Loy. L.A. L. Rev. 1073, 1095 (2010) (discussing claim construction reversal rate for 2008). At a minimum, Petitioner’s new

interpretation suggests that every claim construed in those cases would be retroactively indefinite. Such a broad reading of § 112 overturning hundreds of years of jurisprudence and countless claim constructions rendered by the lower courts cannot possibly be correct. *See, e.g., Markman*, 517 U.S. at 377-383 (providing history of claim construction dating back to 1850). Nor is such a penalizing view of § 112(b) fair to patent holders who have relied upon this country's longstanding precedent that reasonable claim ambiguities are resolved through claim construction, not through punitive consequences of invalidity.

Adopting a standard requiring a patentee to define his invention in such precise terms that any two skilled artisans anywhere in the world would agree on, even as technology and terminology evolve, is an unrealistic burden and contrary to the teachings of this Court.

**B. Petitioner Offers Little Clarification
When Claim Construction Would, Or
Would Not, Be Appropriate Under Its
Standard**

Although Petitioner argues that claim construction doctrine would still have a role under patent law, it fails to offer any clarity regarding what that role would be. The only purpose Petitioner provides for claim construction is solely to rephrase claim terms so that lay jurors can more easily understand them. While this may indeed be one

aspect of claim construction under our current system, it is far from the only function. Claim construction is performed even where bench trials take place in district court. Moreover, Administrative Law Judges at the International Trade Commission, a venue where juries are nonexistent, routinely engage in claim construction. *E.g., Tessera, Inc. v. Int'l Trade Comm'n*, 646 F.3d 1357, 1364 (Fed. Cir. 2011); *Linear Tech. Corp. v. Int'l Trade Comm'n*, 566 F.3d 1049, 1054-60 (Fed. Cir. 2009). The suggestion that claim construction is limited to simplifying the claim terms for jurors is therefore without support. *See, e.g., Markman*, 517 U.S. at 390 (explaining that one purpose of claim construction is to ascertain the limits of the claimed invention).

Petitioner offers no further guidance on what role, if any, claim construction would have under its new interpretation of § 112. This is not surprising because, as explained earlier, any reasonable dispute regarding a claim's meaning would lead to indefiniteness, rendering construction unnecessary.

The effect of such a drastic change could lead to widespread uncertainty regarding both the scope of coverage with respect to issued patents and future patent litigation procedure. For entities like *amici*, this sort of stability is largely responsible for the investment in research and development leading to the wireless devices and technologies widely used around the world. As a policy matter, therefore, Petitioner's suggested withdrawal of decades of precedent should be rejected. *See, e.g., Graham v.*

John Deere Co. of Kansas City, 383 U.S. 1, 18 (1966) (recognizing the need for “uniformity and definiteness” in the obviousness context).

CONCLUSION

For the reasons set forth above, the Court should reject Petitioner’s request to alter the longstanding rule that a claim be insolubly ambiguous before it is deemed indefinite. Because the precedent of this Court and the Federal Circuit regarding the indefiniteness standard strikes the appropriate balance necessary for parties like *amici* to foster innovation, Petitioner’s new interpretation should be rejected.

Respectfully submitted,

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